

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ISAAC CASTRO,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. [16-cv-00501-MEJ](#)

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 16

INTRODUCTION

Plaintiff Isaac Castro (“Plaintiff”), as Personal Representative of the Estate of Sara Castromata, his daughter, brings suit against the United States of America (“Defendant”) under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680. Pending before the Court is Defendant’s Motion to Dismiss pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of subject matter jurisdiction in light of *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. Dkt. No. 16. Plaintiff filed an Opposition (Dkt. No. 18), and Defendant filed a Reply (Dkt. No. 20). The Court finds this matter suitable for disposition without oral argument and **VACATES** the July 14, 2016 hearing. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b). Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court **GRANTS** Defendant’s Motion for the following reasons.

BACKGROUND

The following facts are taken from Plaintiff’s Complaint. *See* Compl., Dkt. No. 1 (filed Jan. 28, 2016). Sara Castromata was on active duty for the United States Marine Corps (“USMC”) stationed at Marine Corps Base, Quantico, Virginia (“MCBQ”) at the time of her death. *Id.* ¶ 3. On March 21, 2013, Sgt. Eusebio Lopez fatally shot Castromata while she was in her barracks room aboard MCBQ. *Id.* ¶¶ 4, 12, 38.

1 Plaintiff alleges Lopez had documented head trauma and PTSD, following his three tours
2 in support of Operation Iraqi Freedom. *Id.* ¶ 13. Lopez was initially supposed to transfer to
3 MCBQ to attend Recruiter school, but he was reassigned to serve at the Officer Candidates School
4 (“OCS”) aboard MCBQ after failing a mental health screening. *Id.* ¶ 15. When Lopez was
5 transferred to MCBQ in March¹ 2012, MCBQ did not obtain or review his medical records, and
6 subsequently Lopez stopped treating his mental health issues. *Id.* ¶ 14.

7 Lopez and Castromata had a brief, intimate relationship that began in November 2012 and
8 ended several weeks prior to March 21, 2013. *Id.* ¶ 28. Castromata began dating Cpl. Jacob
9 Wooley following her relationship with Lopez. *Id.* ¶ 34.

10 On March 21, 2013, Lopez sent Castromata a text message indicating he was going to
11 commit suicide. *Id.* ¶ 29. Castromata warned the Sentry about Lopez’s text and mental state, but
12 the Sentry did not notify the chain of command or document the incident. *Id.* ¶ 30. The same day,
13 Lopez told the Sentry he was locked out of his room and asked for the master key, which the
14 Sentry gave him. *See id.* ¶ 33. Lopez later returned his own room key to the Sentry, instead of the
15 master key. *Id.*

16 While Castromata and Wooley were on liberty and off-base on a dinner date, Lopez used
17 the master key to access Castromata’s room, Wooley’s room, and the stairwells. *Id.* ¶ 35.
18 Castromata and Wooley returned to the barracks between 8:30 and 9:00 p.m. and watched a movie
19 in Wooley’s room before returning to Castromata’s room. *Id.* ¶ 36. Around 10:00 p.m., Lopez,
20 under the influence of alcohol and in possession of a firearm, confronted Castromata and Wooley,
21 and fatally shot Wooley, Castromata, and himself. *Id.* ¶ 38. Plaintiff alleges their bodies were left
22 in place for over six hours before any action was taken to determine if the injuries were survivable.
23 *Id.* ¶ 39. Specifically, Plaintiff alleges “no action was taken to determine the medical condition of
24 all personnel involved until approximately four hours after the shooting; local civilian authorities
25 were not contacted during this time to assist.” *Id.*

26 Plaintiff brings a single claim in this lawsuit: negligence. *Id.* ¶¶ 41-44. In addition to the

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28 ¹ The Complaint states that Lopez was transferred in *May* 2012, but this appears to be a
typographical error. Compl. ¶ 3.

1 events above, Plaintiff alleges that upon arrival at MCBQ, Lopez never attended a Welcome
 2 Aboard Brief, which reviews the Command's policies and procedures for personal firearms. *Id.* ¶
 3 16. Furthermore, Lopez owned a Springfield XD .45 caliber, semi-automatic pistol and
 4 Remington shotgun in addition to several large knives and ammunition, which he originally stored
 5 off-base at his personal residence. *Id.* ¶¶ 17, 18. Plaintiff alleges the Command knew about
 6 Lopez's firearms by the time he moved into the barracks at OCS, but they did not ensure his
 7 weapons were registered and stored at the armory. *Id.* ¶¶ 22-25. Indeed, in August 2012,
 8 members of OCS Command received information that Lopez had weapons and suicidal
 9 aspirations, but Plaintiff indicates the Command mishandled this incident by, among other things,
 10 failing to properly log important details about the incident, including Lopez's possession of
 11 weapons. *Id.* ¶¶ 19-22. Additionally, the Command is required to conduct Force Preservation
 12 Boards ("FPB"), where members of the command discuss individuals with mental illness or
 13 suicidal/homicidal intentions or histories, but OCS's FPB, held on September 25, 2012, never
 14 mentioned Lopez's name, suicidal ideations, weapons, or move into the barracks. *Id.* ¶¶ 26-27.

15 Plaintiff claims Defendant breached its duty to ensure the barracks was a safe environment
 16 and to uphold and enforce its regulations by, among other things: (1) failing to consciously and
 17 deliberately transfer Lopez's medical records; (2) failing to ensure Lopez registered and stored his
 18 weapons in the armory; (3) failing to discuss and remedy Lopez's mental health issues at the
 19 Command's FPB; (4) giving Lopez the master key, in violation of a Marine Corps Order; (5)
 20 putting a Marine who had multiple Non-Judicial Punishments and was in the process of being
 21 administratively discharged on Duty as the Sentry and in-possession of the master key; (6) failing
 22 to enforce non-discretionary Department of Defense and Marine Corps orders; (7) failing to
 23 provide emergency medical attention immediately after the shooting; and (8) failing to contact
 24 local civilian authorities to assist. *Id.* ¶ 43.

25 While acknowledging the tragic nature of this case, Defendant moves to dismiss under
 26 *Feres v. United States* and its progeny, which prohibit suits against the military for injuries arising
 27 out of or in the course of activity "incident to service." 340 U.S. at 146. Defendant argues the
 28 "*Feres* doctrine" divests the Court of subject matter jurisdiction over Plaintiff's case. Mot. at 1, 3.

LEGAL STANDARD

Federal district courts are courts of limited jurisdiction; “[t]hey possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted). Accordingly, “[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.*; *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to move to dismiss a lawsuit for lack of subject matter jurisdiction. A jurisdictional challenge may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where the attack is facial, the court determines whether the allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction, accepting all material allegations in the complaint as true and construing them in favor of the party asserting jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Where the attack is factual, however, “the court need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air for Everyone*, 373 F.3d at 1039. In resolving a factual dispute as to the existence of subject matter jurisdiction, a court may review extrinsic evidence beyond the complaint without converting a motion to dismiss into one for summary judgment. *Id.*; *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (holding that a court “may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction”).

A motion to dismiss based on *Feres v. United States* is a request for dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *Bowen v. Oistead*, 125 F.3d 800, 803 (9th Cir. 1997) (citing *Jackson v. United States*, 110 F.3d 1484, 1486 (9th Cir. 1997)).

DISCUSSION

The Federal Tort Claims Act (“FTCA”) “effects a broad waiver of the United States’ sovereign immunity from suit for tort damages.” *Jackson v. Tate*, 648 F.3d 729, 733 (9th Cir. 2011) (citing 28 U.S.C. § 2674); *see also* 28 U.S.C. § 1346(b) (“[D]istrict courts . . . have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . .

for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”). “In an exception to this waiver,” however, “the FTCA withholds the United States’ consent to be sued for ‘[a]ny claim arising out of *the combatant activities* of the military or naval forces, or the Coast Guard, *during time of war.*’” *Id.* (brackets in original; emphasis added) (quoting 28 U.S.C. § 2680(j)).

In *Feres v. United States*, the Supreme Court expanded this exception and held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” 340 U.S. at 146. The Supreme Court has been criticized for its decision in *Feres* as going well beyond what Congress intended in delineating the foregoing exception to the FTCA in § 2680(j). *See United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (“*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.”). Nonetheless, the Supreme Court has continued to uphold *Feres* and its “bar has been interpreted broadly[,]” so that “[p]ractically any suit that ‘implicates the military judgments and decisions’ . . . runs the risk of colliding with *Feres*.” *Bowen*, 125 F.3d at 803 (quoting *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991)) (internal marks omitted). The Ninth Circuit Court of Appeals has held that “the *Feres* doctrine is applicable ‘whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.’” *Bowen*, 125 F.3d at 804 (quotations and internal marks omitted)).

In assessing whether the *Feres* doctrine applies, courts consider “two common factors”: (1) whether the injured person was a member of the armed forces of the United States at the time the injury was sustained; and (2) whether the injury arises out of or occurred in the course of activity incident to military service. *See Jackson*, 648 F.3d at 733. As there is no dispute Castromata was on active duty for the USMC at the time of her death, Compl. ¶ 3, the key inquiry and dispute in this matter is whether her death occurred “in the course of activity incident to [her] service.”

1 *Feres*, 340 U.S. at 146.

2 In *Johnson v. United States*, the Ninth Circuit articulated four factors for determining
3 whether an injury has been sustained in the course of an activity “incident to service,” including
4 (1) the location where the activity giving rise to the injury occurred; (2) the duty status of the
5 plaintiff at the time of activity giving rise to the injury; (3) the benefits accruing to the plaintiff
6 because of her status as a service member; and (4) the nature of the plaintiff’s activities at the time
7 of the activity giving rise to the injury. 704 F.2d 1431, 1436-41 (9th Cir. 1983); *Jackson v. Tate*,
8 648 F.3d at 733 (applying factors); *see also Schoenfeld v. Quamme*, 492 F.3d 1016, 1021 (9th Cir.
9 2007) (“[T]he most relevant line of inquiry is whether or not the service member’s activities at the
10 time of the injury are of the sort that could harm the disciplinary system if litigated in a civil
11 action.” (quoting *Johnson*, 704 F.2d at 1439). While courts in the Ninth Circuit have relied on
12 such factors in guiding their analysis, in *United States v. Shearer*, the Supreme Court has stated
13 that “[t]he *Feres* doctrine cannot be reduced to a few bright-line rules,” 473 U.S. 52, 57 (1985).
14 The Ninth Circuit has directed courts to thus focus on the “totality of the circumstances” to
15 determine whether the alleged injury occurred “incident to service.” *See Costo v. United States*,
16 248 F.3d 863, 867 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002). In doing so, “lower courts
17 have typically resorted to comparing fact patterns in previous cases with that in the case before
18 them in an effort to produce the most appropriate outcome.” *Estate of McAllister v. United States*,
19 942 F.2d 1473, 1477 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1164 (1992). Additionally, the Ninth
20 Circuit has recognized that the “key inquiry is ‘whether the suit requires the civilian court to
21 second-guess military decisions, . . . and whether the suit might impair essential military
22 discipline[,]’” noting that the “the interest in maintaining military discipline—is ‘the most
23 persuasive justification’ for the [*Feres*] doctrine, and our *Feres* cases have focused mainly on
24 whether the serviceman’s activities implicate that interest.” *Schoenfeld*, 492 F.3d at 1019
25 (quotations omitted).

26 Defendant cites *McAllister* as controlling precedent for this case. Mot. at 7. *McAllister* in
27 turn relied on the Supreme Court’s decision in *United States v. Shearer*, 473 U.S. 52 (1985). In
28 *Shearer*, Army Private Vernon Shearer was off-duty and away from base when he was kidnapped

1 and murdered by another serviceman, Andrew Heard. 473 U.S. at 53. Shearer's mother brought
 2 suit under the FTCA, alleging the Army had been negligent because it knew Heard was dangerous
 3 and yet had "failed to exert a reasonably sufficient control over' him and 'failed to warn other
 4 persons that he was at large.'" *Id.* at 53-54. The Court held that *Feres* barred the action because it
 5 would entail the "hal[ing] [of] Army officials into court to account for their supervision and
 6 discipline of Private Heard," *id.* at 59, explaining that

7 [t]o permit this type of suit would mean that commanding officers
 8 would have to stand prepared to convince a civilian court of the
 9 wisdom of a wide range of military and disciplinary decisions; for
 10 example, whether to overlook a particular incident or episode,
 whether to discharge a serviceman, and whether and how to place
 restraints on a soldier's off-base conduct.

11 *Id.* at 58. Even though respondent focused on her claims on the Army's negligence,
 12 "characterizing her claim as a challenge to a 'straightforward personnel decision[.]'" the Supreme
 13 Court rejected this argument, asserting that "[b]y whatever name it is called, it is a decision of
 14 command." *Id.* at 59. The Court thus held that *Feres* barred Shearer's mother's FTCA claim.

15 The Ninth Circuit subsequently adhered to the *Shearer* rationale in upholding the dismissal
 16 of a wrongful death action that alleged that the military was negligent in its supervision of a
 17 known paranoid schizophrenic with dangerous tendencies who killed an off-duty serviceman.
 18 *McAllister*, 942 F.2d at 1477-79. There, the complaint alleged

19 The direct and proximate cause of the death of the decedent was the
 20 negligence of the defendant, the Department of the Army and its
 21 agents and employees[,] in carelessly, wrongfully and negligently
 22 failing to properly supervise, control and treat said Private Tarver
 23 and in failing to otherwise protect the decedent, William F.
 24 McAllister, from said Private Leon Tarver when defendant, it's [sic]
 25 employees and agents knew or should have known that Private
 Tarver posed a foreseeable risk of harm to the public. The
 supervision, control and treatment of said Private Leon Tarver did
 not require defendants, employees, and agents to exercise complex,
 subtle, and professional judgment as to composition, training [,]
 equipping and controlling of a military force.

26 *Id.* at 1478 n.3. As much as the Court may wish to ignore the parallels between *McAllister* and the
 27
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allegations in this case, they are much too similar to do so.²

Plaintiff attempts to distinguish *Feres* and its progeny, acknowledging those cases contain “one unifying principle: courts do not want to second guess military management or military discipline.” Opp’n at 12 (citing *Feres*, 340 U.S. at 136; *Shearer*, 473 U.S. at 58; *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991)); see also *Schoenfeld*, 492 F.3d at 1019 (recognizing the interest in maintaining military discipline is “the most persuasive justification” for the *Feres* doctrine). But he claims that is not the issue here. Rather, Plaintiff generally argues (A) “many of the defendant’s wrongful acts willfully or recklessly disregarded non-discretionary” military and USMC Orders, e.g., “it is uniform policy of the Marine Corps to require all personally-owned fire arms to be stored at the base armory, yet the Command here failed to (1) notify incoming Marines of this policy and (2) enforce the base order”; and (B) there is “nothing distinctly military about the negligence” alleged in this case and the same type of negligence could just as easily been alleged in a non-military, private civilian context. See Opp’n 13-14. There is some internal conflict in this logic, i.e., saying that Defendant’s negligence stems from failure to follow military rules but at the same point arguing that those acts were not distinctly military—nonetheless, the Court understands Plaintiff’s point to be that some of Defendant’s negligent acts relate to violating mandatory military orders, and other acts demonstrate more general failure to exercise due care under the circumstances.

There are two problems with Plaintiff’s first argument. First, Plaintiff has cited no authority for this proposition. The only case Plaintiff relies on is *Berkovitz v. United States*, 486 U.S. 531, 548 (1980), which Plaintiff acknowledges held that “the discretionary function exception to the FTCA does not shield a Federal agency that does not comply with mandatory rules.” Opp’n at 13. The discretionary function exception to the FTCA is not related to the *Feres* doctrine, and the holding has no bearing on this case. Second, when it comes to assessing whether and how to enforce military orders and rules, permitting a suit on such grounds directly implicates the concern about second-guessing military decisions and *Shearer*’s statement that it would mean

² Plaintiff’s Opposition does not mention or attempt to distinguish *McAllister*. See generally Opp’n.

1 commanding officers “would have to stand prepared to convince a civilian court of the wisdom of
2 a wide range of military and disciplinary decisions; for example, whether to overlook a particular
3 incident or episode” 473 U.S. at 58. The Court therefore cannot say that simply because the
4 military has orders or rules on a subject means that the concerns underlying *Feres* and its progeny
5 can be overcome.

6 As to Plaintiff’s second argument, the Supreme Court “has sent the message that . . . an
7 individual can, based solely upon his status as a member of the armed forces, be proscribed from
8 enjoying the same legal remedies as his civilian counterparts.”³ Mark G. Maser, *Torts - Feres*
9 *Doctrine - United States Courts of Appeals Consistently Hold That Members of the Armed Forces*
10 *Are Barred from Bringing Suits Against the Government When Service Members Are Injured*
11 *Incident to Military Sponsored Sports and Recreational Activities*, 12 Seton Hall J. Sport L. 333,
12 359 (2002); *see also Costo*, 248 F.3d at 867 (“If the fear is that civilian courts will be permitted to
13 second-guess military decisions, then even civilian suits that raise such questions should be barred.
14 But they are not.” (citation omitted)). While Plaintiff cites a handful of cases that seem to
15 recognize the civilian/military distinction as a basis for withholding the application of *Feres*, they
16 have done so under markedly different circumstances from those here. *See Schoenfeld*, 492 F.3d
17 at 1026 (noting “the neglected damage to the guardrail in this case could just as easily have existed
18 on a non-military road” but also acknowledging “[t]here was nothing distinctly military about the
19 earlier car crash that created it, nor about the dangerous condition itself.”); *Dreier v. United States*,

20
21 ³ This was not always the case. As the Ninth Circuit recognized, *Brooks v. United States*, 337
22 U.S. 49 (1949) seemed to hold otherwise. *See McAllister*, 942 F.2d at 1477. Specifically, in
23 *Brooks*, the Supreme Court held that the tort suit brought by two servicemen (brothers) struck by a
24 military-owned vehicle driven by a civilian employee of the Army while they were out on
25 furlough and driving along a public highway could proceed, thereby rejecting the contention that
26 the brothers’ father, riding in the same car, could recover for his injuries but there could be no
27 liability to the sons, solely because they were in the Army. *See* 337 U.S. at 52. The Supreme
28 Court rejected the contention primarily because the brothers were on leave at the time, which was
not analogous to that of a soldier injured while performing his duties under orders. *Id.* (“[W]e are
dealing with an accident which had nothing to do with the Brooks’ army careers, injuries not
caused by their service except in the sense that all human events depend upon what has already
transpired.”). But as the *McAllister* court noted, “[i]f the evolution of the *Feres* doctrine had
stopped in 1950, appellants would have the better argument” in regard to the civilian/military
distinction. 942 F.2d at 1477. But ultimately, subsequent cases “have expanded greatly the
factual circumstances under which the conduct of military personnel will be deemed ‘incident to
service.’” *Id.*

1 106 F.3d 844, 853-54 (9th Cir. 1996), *as amended* (Feb. 4, 1997) (noting “Ronald was in the same
2 position as any civilian would have been at the time of the government’s negligence” and that “the
3 same type of negligence [] could be alleged against a completely private water treatment plant”
4 but also noting “[t]his case makes no allegations of inadequate military supervision or training”).

5 The Court is thus left with the nature of Plaintiff’s allegations, which all ultimately
6 implicate military management and decision-making. Plaintiff alleges Defendant was negligent in
7 the following respects: (1) failing to consciously and deliberately transfer Lopez’s medical
8 records; (2) failing to ensure Lopez registered and stored his weapons in the armory; (3) failing to
9 discuss and remedy Lopez’s mental health issues at the Command’s FPB; (4) giving Lopez the
10 master key, in violation of a Marine Corps Order; (5) putting a Marine who had multiple Non-
11 Judicial Punishments and was in the process of being administratively discharged on Duty as the
12 Sentry and in-possession of the master key; (6) failing to enforce non-discretionary Department of
13 Defense and Marine Corps orders; (7) failing to provide emergency medical attention immediately
14 after the shooting; and (8) failing to contact local civilian authorities to assist. Compl. ¶ 43; *see*
15 Mot. at 5-6 (arguing that “each of those steps would go ‘directly to the “management” of the
16 military’ and ‘call into question basic choices about the discipline, supervision, and control of a
17 serviceman.’” (quoting *Shearer*, 473 U.S. at 58). The Court reluctantly agrees with Defendant that
18 Plaintiff’s allegations all implicate the concerns sheltered by *Feres*’ progeny. *See Ritchie v.*
19 *United States*, 733 F.3d 871, 876 (9th Cir. 2013) (recognizing that courts have noted such
20 concerns as the fact “that adjudication of her claim would require a court to ‘examine the
21 government’s activity in relation to military personnel on active duty’” and would “require
22 members of the Armed Services to testify in court as to each other’s decisions and actions.”
23 (quotations omitted)).⁴

24
25 ⁴ This is the first time the undersigned has dealt with the *Feres* doctrine, and it strikes the Court
26 that this doctrine—or at least the way it has been interpreted—is inconsistent with the plain
27 language of the statutory exception of the FTCA. *See* 28 U.S.C. § 2680(j). But as the *Costo* court
28 recognized, “until Congress, the Supreme Court, or an en banc panel of [the Ninth Circuit]
reorients the [*Feres*] doctrine, [courts] are bound to follow” this doctrine. 248 F.3d at 869; *but see*
id. at 869 (Ferguson, J., dissenting) (challenging the constitutionality of *Feres* doctrine on equal
protection and separation of powers grounds).

CONCLUSION

In light of the foregoing, the Court must **GRANT** Defendant's Motion to Dismiss Plaintiff's Complaint. As the fundamental nature of Plaintiff's allegations implicate the *Feres* doctrine, and there is no indication that Plaintiff would be able to allege new or different facts to bring this case out of *Feres*' purview, the Court must **DISMISS** Plaintiff's Complaint **WITH PREJUDICE**. The Clerk of Court shall close the file.

IT IS SO ORDERED.

Dated: June 21, 2017



MARIA-ELENA JAMES
United States Magistrate Judge